



## INTERIOR BOARD OF INDIAN APPEALS

Mark Small v. Commissioner of Indian Affairs

8 IBIA 18 (03/10/1980)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

## ADMINISTRATIVE APPEAL OF MARK SMALL

v.

## COMMISSIONER OF INDIAN AFFAIRS

IBIA 79-27-A

Decided March 10, 1980

Appeal from decision of Acting Deputy Commissioner of Indian Affairs upholding refusal by Area Director to revive canceled lease of trust lands.

Affirmed.

1. Indian Lands: Leases and Permits: Long-term  
Business/Agriculture: Cancellation

Where tribe leased lands to operator of a post and pole plant for the declared purpose that he conduct a business on tribal lands, and the attendant circumstances of the negotiation for the lease establish the tribe sought to use the leasing agreement to foster business on the reservation and lower tribal unemployment thereby, the failure and subsequent termination of the business venture provided cause for cancellation of the lease pursuant to 25 CFR 131.14.

2. Indian Lands: Leases and Permits: Violation: Generally

Where BIA office notified appellant lessee of default in performance and sought, on several occasions, to obtain his performance or relinquishment of leased lands, notice requirements of 25 CFR Part 2 were substantially met, since appellant had actual notice of subsequent lease termination.

3. Indian Lands: Contracts: Formation and Validity: Generally--  
Indian Lands: Leases and Permits: Long-term  
Business/Agriculture: Generally

Recital in a lease agreement of a one dollar annual rental is, under the circumstances of the case, merely a formal recital and does not state the actual consideration for the leasing agreement intended by the parties. Acceptance of the nominal rental by the BIA office concerned did not, therefore, operate to waive the substantial breach of the lease caused by appellant's nonperformance.

APPEARANCES: Graham Purcell, Esq., for appellant Mark Small; David E. Jones, Esq., Office of Solicitor, Department of the Interior, for appellee United States.

#### OPINION BY ADMINISTRATIVE JUDGE ARNESS

Appellant seeks relief from a decision by the Acting Deputy Commissioner of Indian Affairs sustaining the refusal by the Billings Area Director, Bureau of Indian Affairs (BIA), to reinstate a lease of 200 acres of trust land to appellant by the Northern Cheyenne Tribe.

On August 18, 1969, appellant entered into lease agreement No. C57236 with the tribe for 200 acres of tribal trust lands to be used for business purposes. The written agreement of the parties was made using Departmental Form 5181 (October 1961) which incorporates the regulations appearing at 25 CFR Part 131 into the lease. <sup>1/</sup> The term of the lease, as approved by the acting superintendent on September 5, 1969, is for 25 years, with provision for renewal for an additional 25-year term. The written agreement recites the purpose of the agreement to be for a "residence and a business enterprise." Although not described in detail in the written lease, the proposal leading to the agreement and the negotiations surrounding the lease were that appellant, who then lived at Busby, Montana, proposed to operate a pole and post business on 200 acres of tribal property located on the reservation in Montana. The tribe charged an annual rental of \$1 for the use of the land. The essence of the transaction was the conduct by appellant of a pole and post business on the reservation which the parties anticipated would create added employment opportunities for members of the tribe, enhance the general climate for business on the reservation, and supply appellant with income from profits earned by the business. As part of the inducement to appellant to take the risk involved in beginning the business, it was agreed he would have his residence at the plant site, apparently both

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<sup>1/</sup> The complete written agreement to lease is attached.

to facilitate the production effort at the plant and to provide him with an added benefit from the lease.

The pole and post venture failed during the first year of its operation, however, and a foreclosure by appellant's equipment mortgagee resulted in the sale at auction in November 1970 of his inventory of posts and poles and all equipment, trucks, office furniture, and his mobile home, all located on the leased premises. Following the foreclosure sale, appellant left the reservation and the State of Montana. In answer to a communication from the superintendent in December 1970 asking appellant's intentions concerning the lease, appellant, replying from Utah, notified the Agency Realty Officer that "[i]t is my hope that we will, in due time, resume operation of our post and pole operation. Perhaps on a much smaller scale."

In February 1972 appellant was asked by the agency superintendent, again acting on behalf of the tribe, to surrender the leased land since it was untended and stray cattle were in trespass on the property. He replied, again from Utah, that others were responsible for the acts complained of. Subsequently, appellant moved to Maryland. He did not thereafter return as a resident to the reservation in Montana. The 200-acre tract leased to him remained unused. Despite notice of the trespasses occurring on the land, appellant took no action to cure or prevent injury to the land.

On May 1, 1972, the tribe applied to the agency to cancel the lease. Thereafter, the lease was canceled. Not until 1976, however, did appellant receive written notice of cancellation of the lease and an indication of his right to appeal the cancellation action taken by the agency. In August 1977 appellant sent the BIA agency concerned a \$5 check, for rent from 1977 to 1982 for the 200-acre tract. The check was cashed by the agency, which then attempted to refund the proceeds of the check to appellant on December 1, 1977. Appellant has consistently rejected successive attempts by BIA to return the \$5 payment.

On August 9, 1977, appellant sought recognition of the validity of his lease from the Billings Area Director, who, on September 19, 1977, refused to reinstate the lease, declaring it had been canceled in 1972 for several reasons, primary among which was appellant's failure to continue to run his post and pole business on the property. 2/

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2/ The Area Director also opined that the lease was at best a voidable instrument, since it had not been reviewed by his staff prior to approval in conformity to practice and departmental regulation and because it would not have been approved as written had it been properly reviewed. The Director regarded the agreement to be incomplete and one-sided in favor of appellant, but his final decision was based upon his estimation that the business which was the purpose of the lease having failed the lessee was in violation of the lease within the meaning of 25 CFR 131.14, requiring cancellation.

Appellant then sought relief from the Area Director's decision by appeal to the Commissioner, who, on May 21, 1979, affirmed the Area Director's decision. The opinion by the Commissioner was based on the conclusion that, the consideration for the lease having failed when the business terminated, there was a material violation of the lease which permitted cancellation for violation of the lease under governing regulations. In his opinion the Commissioner reasons:

Implicit in a development lease of this type and part of the understanding of the parties is the element of diligence. The ground rent was nominal because it was premised on the fact that a business would be started, tribal members given employment and the overall tribal economy enhanced. Appellant initially exercised such diligence but the business failed and there have been no subsequent attempts to start a new business. Appellant absented himself from the reservation and has shown no subsequent intent or capability to perform his end of the bargain. In other similar leases if a lessee does not or cannot perform during the primary term of the lease it is terminated \* \* \*.

Timely appeal was taken to this Board, where appellant reasserts the contentions made to the Area Director and the Commissioner. <sup>3/</sup> The basis for his claim for relief rests primarily on factual grounds. Based on his interpretation of the facts, appellant contends (1) that since the lease was validly executed and approved, the right to possession for the full term of the lease was taken without due process of the law and contrary to the lease itself when cancellation occurred without notice to him; (2) that since ground rents until 1982 were accepted by the BIA on behalf of the tribe, any prior breach in the lease was waived by the tribe as a result; and (3) that the lease is valid in any case because it has never been canceled in conformity to Departmental regulations governing cancellation.

[1] Although discussed in detail by appellant, whether the Cheyenne Agency acting superintendent exceeded his authority by approving the lease as originally drafted without consultation with the Area Director is not a real issue on appeal. Certainly, the failure to obtain the regular in-house legal review of the written lease

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<sup>3/</sup> On December 20, 1979, the Board referred the record to an Administrative Law Judge to conduct an evidentiary hearing pursuant to 43 CFR 4.361(a). A prehearing order was entered on January 10, 1980, in which the parties were directed to file with the Judge, on or before February 8, 1980, a statement of position, relief requested, identity of witnesses and suggested hearing date. Appellant's counsel was served a copy of the order on January 14, 1980. Nothing being filed by appellant, the Judge referred the matter back to the Board for further action on February 22, 1980.

as dictated by Departmental practice had no effect on the conduct of the parties in this case. 4/ For the purposes of this opinion, it is assumed the lease was properly executed and regularly approved on September 5, 1969. Generally, if it appears there is an ambiguity in the provisions of a leasing agreement, the intent of the parties must be ascertained by examination of the circumstances of the lease: this rule applies to leases of Indian lands. 5/

Thus, the negotiations for the lease, the leasing agreement itself, and the subsequent events from 1969 through 1972 determine the rights of the parties in this case since the BIA and appellant both contend such ambiguity in the lease makes the case depend on the intent of the parties to the agreement, which intent is not evident from the lease agreement itself.

It is axiomatic that it is proper in evaluating leases of Indian trust lands to consider all the attendant circumstances surrounding the negotiation and execution of the agreement to ascertain the intentions of the parties to the lease when determining their relative rights. 6/ Thus, in reading the stated purpose clause of the lease to determine what the parties intended their agreement to be, not only the other provisions of the written agreement are to be considered, but also relevant are the proposals of the lessee which obtained the lease and the circumstances surrounding the agreement. The Federal law regulating leases of Indian trust lands is to be applied to the facts revealed by a review of the circumstances relevant to the agreement. 7/ In this lease, the provisions of 25 CFR Part 131 control the agreement made by the parties. Prior decisions of the Department have established Departmental policy in the application of its leasing regulations, and indicate that long-term business leases may be canceled upon the Indian lessor's demand where a material default of the lease agreement has occurred. 8/

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4/ The Area Director raised this point concerning the authority of the acting superintendent to approve the lease, but then pointed out the entire matter was beside the point since the agreement had been executed and the lessee had defaulted before the Area Director noticed the supposed deficiencies in the written agreement. Had the Area Director not made this gratuitous observation, it seems unlikely appellant would ever have raised the matter on appeal to lead into his argument that the parties intended him to acquire a vested right in the remainder of the 25-year term.

5/ United States v. Lewiston Lime Co., 466 F.2d 1358 (9th Cir. 1972).

6/ Kirby v. United States, 260 U.S. 423 (1922).

7/ Bledsoe v. United States, 349 F.2d 605 (10th Cir. 1965).

8/ Sunny Cove Development Corporation v. Flora Cruz, a.k.a. Florida Patencio, 3 IBIA 33 (1974); Villa Vallerto v. Mildred L. P. Patencio, 2 IBIA 140, 81 I.D. 9 (1974).

Here, inquiry to appellant concerning his intention to resume the activity contemplated by the leasing agreement was initiated by the tribe acting through the BIA in December 1970, in an apparent effort to encourage appellant to perform as contemplated by the parties in their initial dealings. The forbearance of the tribe to that point, and its apparent willingness afterwards to continue the lease (provided the original object of the agreement could still be achieved), do not indicate a waiver by the tribe of any rights either under the lease or under applicable regulations. <sup>9/</sup> When he asserted his intention to begin business anew, albeit with perhaps a smaller effort on his part, appellant restated the consideration for the lease, while simultaneously promising to cure the breach caused by his inactivity. His failure to take any meaningful action to implement his promised plan however, eventually forced the tribe to seek cancellation of the lease. Prior to that event, in February 1972, appellant was given actual notice of the termination action by the BIA office concerned. He was told what he already knew--that the land was vacant and uncared for. Despite these notifications, appellant contends that "to this day no violations by Small of the terms of lease has been claimed and made known to Small." <sup>10/</sup> His brief avoids altogether any discussion concerning performance under the terms of the lease. Appellant instead argues that the discovery of the intent of the parties to the lease is proper to an understanding of this issue. Thus the logical extension of his position is that the parties planned the lease to continue for the full term, provided that appellant made a good faith attempt to run a business on the land. Appellant seems to conclude that, having tried to run a business and failed, he has provided the consideration agreed upon, and the remainder of the lease is therefore indefeasibly vested in him; cancellation without formal notice, so this theory runs, operated to deprive him of a vested interest in the land.

This analysis, however, ignores the BIA notices to him in 1970 and in 1972, which are part of the attendant circumstances. He had actual notice of his nonperformance; he first sought to excuse and then ignored his failure to perform, but he has not denied the fact of nonperformance. It is not, therefore, reasonable to conclude, as appellant urges, that a short and abortive attempt to establish a business on the leased lands satisfied the stated purpose of the lease so completely that the remaining 24 years of the 25-year lease vested in appellant despite any right the tribe might attempt to assert to

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<sup>9/</sup> Sessions, Inc. v. Morton, 491 F.2d 854 (9th Cir. 1974); and see discussion in United States v. Forsness, 125 F.2d 928, 933-940 (2d Cir. 1942) cert. denied sub nom. City of Salamanca v. United States, 316 U.S. 694 (1942).

<sup>10/</sup> Appellant's brief, p. 11.

remove him for his continuing violation of the lease's terms. <sup>11/</sup> Under the circumstances, the tribe was justified in the action taken when it canceled the lease; indeed, it was compelled to do so or suffer waste to occur. Appellant had actual notice of the action taken.

[2] The procedural irregularity which occurred when appellant was not timely notified, pursuant to 25 CFR 131.14, of the cancellation of the lease is the basis for appellant's claim he was deprived of the remainder of his lease by Departmental failure to abide by the leasing regulations incorporated into the lease.

The alleged failure by the BIA to give notice of appeal rights in the manner required by Departmental regulation affirmatively appears to have not harmed appellant in any way. Not only has he fully exercised the appeal procedure outlined in 25 CFR 2.3 he has received a complete review of the merits of his case at each successive stage of review. Those reviews have failed to reveal any factual basis for his claim of injury for there is no indication that any action by the tribe hampered appellant in his business venture or in subsequent attempts to start over, nor is there any indication he made any such attempts. If anything, the tribe was more inclined to forbearance than enforcement of its rights under the lease. Two years were allowed to pass, during which time the tribe inquired concerning the prospects for a renewed effort by appellant to set up his business again, and afforded him the opportunity to start over. For whatever reason, the business was not reestablished. When it appeared he would not act, appellant was told the leased lands would be retaken by the tribe.

Appellant's inability to point to any injury to him as a result of the cancellation of the lease or to answer the tribe's complaints of nonperformance reveals the technical nature of his claim that he was deprived of a property right by the manner of the cancellation of the lease in this case. Had he attempted to run his pole and post business on "a much smaller scale" and then found the tribe seeking to

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<sup>11/</sup> Appellant urges that an estoppel should operate here to aid him, citing United States v. Lazy F C Ranch, 481 F.2d 985 (9th Cir. 1973), because, though he acted in good faith when he entered into the lease with the tribe, yet he lost his business in the venture conducted on the tribal lands. There is no suggestion the tribe guaranteed him success, however, nor is there any indication it misled appellant into thinking he was assured 25 years in which to get going. It is clear the parties contemplated immediate performance and their conduct confirms that to have been their intention. To invoke the doctrine of estoppel against the United States successfully, as the court points out in United States v. Lazy F C Ranch, *supra*, is difficult at best and requires hard facts in any case. Such facts are notably absent here.



oust him because his performance was not up to expected levels, his argument would sound with more force on this issue which he now seeks to raise. As it is, the facts do not support the contention made. Appellant was fairly and even generously dealt with by the tribe. His claim that his property was taken without adequate notice is without basis in fact.

[3] Finally, the tender of the nominal ground rent in 1977 and the acceptance of the payment by the BIA agency do not bind the tribe to a waiver of the breach on the lease, both because there is no indication the tribe acquiesced in the agency action and also since the nominal payment is not consideration in the sense that it amounted to a substantial basis for the agreement made by the parties. 12/

Based upon the facts of this case, the Commissioner correctly concluded cancellation of the lease was proper. The decision of the Commissioner affirming the action by the Area Director terminating the lease is affirmed.

This decision is final for the Department.

\_\_\_\_\_  
//original signed  
Franklin Arness  
Administrative Judge

I concur:

\_\_\_\_\_  
//original signed  
Wm. Philip Horton  
Chief Administrative Judge

Attachment

\_\_\_\_\_  
12/ Appellant's arguments concerning waiver also are not supported by the facts developed here. Under the circumstances of this case, the assertion a \$5 payment made to the BIA agency 7 years after operations on the leased lands had ended could revive the lease simply does not make sense (see Sessions, Inc. v. Morton, supra, and cases cited therein for a discussion of the application of the doctrine of waiver to such a case).

Form 5-181  
(October 1961)

U.S. DEPARTMENT OF THE INTERIOR  
BUREAU OF INDIAN AFFAIRS.  
LEASE

\_\_\_\_\_ Northern Cheyenne \_\_\_\_\_ Indian Agency  
Allotment No. TRIBAL  
Lease No - \_\_\_\_\_  
Contract No. C57-236

THIS CONTRACT, made and entered into this 18th day of, August, A.D. 1969,

by and between the Indian or Indians named below (the Secretary of the Interior acting for and on behalf of the Indians)

hereinafter called the "lessor," and MARK SMALL

Busby, Montana 59016 hereinafter called the "lessee" in accordance with the provisions of existing law and the regulations (25 CFR 131) which by reference are made a part hereof.

WITNESSETH, That for and in consideration of the rents, covenants, and agreements hereinafter provided, the lessor hereby lets and leases unto the lessee the land and premises described as follows, to wit:

T. 2 S., R. 42 E.,  
Sec. 25, S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ ;  
Sec. 36, NW $\frac{1}{4}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ ;

with option to-renew another 25 years

containing 200.0 acres, more or less, for the term of 25 years, beginning on the 18th day of August, 1969, to be used only for the following purposes: Residence and  
a business enterprise

The lessee, in consideration of the foregoing, covenants and agrees, as rental for the land and premises, to pay:

TO-	DATE DUE	AMOUNT
BUREAU OF INDIAN AFFAIRS	UPON APPROVAL	\$1.00
	and a like sum to be paid on or	
<u>147320</u>	<u>before August 18th of each succeeding</u>	
	<u>year for the duration of this lease</u>	

In the event of the death of any of the owners to whom, under the terms of this lease, rentals are to be paid direct, all rentals remaining due and payable shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises. This provision is applicable only while the leased premises are in trust or restricted status.

While the leased premises are in trust or restricted status, the Secretary may in his discretion, and upon notice to the lessee, suspend the direct rental payment provisions of this lease in which event the rentals shall be paid to the official of the Bureau of Indian Affairs having jurisdiction over the leased premises.

AMOUNT OF BOND: WAIVER;

LEASE FEE: \$2.00

This lease is subject to the following provisions:

1. "SECRETARY" as used herein means the Secretary of the Interior or his authorized representative.

2. IMPROVEMENTS.-Unless otherwise provided herein it is understood and agreed that any buildings or other improvements placed upon the said land by the lessee become the property of the lessor upon termination or expiration of this lease.

3. UNLAWFUL CONDUCT.-The lessee agrees that he will not use or cause to be used any part of said premises for any unlawful conduct or purpose.

4. SUBLEASES AND ASSIGNMENTS.-Unless otherwise provided herein, a sublease, assignment or amendment of this lease may be made only with the approval of the Secretary and the written consent of all parties to this lease, including the surety or sureties.

5. INTEREST.-It is understood and agreed between the parties hereto that, if any installment of rental is not paid within 30 days after becoming due, interest at the rate of 6 percent per annum will become due and payable the date such rental became due and will run until said rental is paid.

6. RELINQUISHMENT OF SUPERVISION BY THE SECRETARY.-Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land by the issuance of a fee patent or otherwise during the term of the lease; however, such termination shall not serve to abrogate the lease. The owners of the land and the lessee and his surety or sureties shall be notified by the Secretary of any such change in the status of the land.

7. RENTAL ADJUSTMENT.-The rental provisions in all leases which are granted for a term of more than five years and which are not based primarily on percentages of income produced by the land shall be subject to review and adjustment by the Secretary at not less than five-year intervals in accordance with the regulations in 25 CFR 131. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by this contract or the

contribution value of such improvement.

8. INTEREST OF MEMBER OF CONGRESS.-No Member of, or Delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

9. VIOLATIONS OF LEASE-It is understood and agreed that violations of this lease shall be acted upon in accordance with the regulations in 25 CFR 131.

10. ASSENT NOT WAIVER OF FUTURE BREACH OF COVENANTS.-No assent, express or implied to any breach of any of the lessee's covenants, shall be deemed to be a waiver of any succeeding breach of any covenants.

11. UPON WHOM BINDING -- It is understood and agreed that the covenants and agreements hereinbefore mentioned shall extend to and be binding upon--the heirs, assigns, successors, executors, and administrators of the parties of this lease. While the leased premises are in trust or restricted status, all of the lessee's obligations under this lease; and the obligations of its sureties are to the United States as well as to the owner of the land.

12. APPROVAL--It is further understood and agreed between the parties hereto that this lease shall be valid and binding only after approval by the Secretary.

13. ADDITIONS --Prior to execution of this lease,

provision(s) number(s) 14, 15, 16, 17, 18  
and 19 ~~has~~ (have) been added hereto and by reference  
~~is~~ (are) made a part hereof.

PROVISION NO. 2. IMPROVEMENTS - above, does not apply to this contract.

14. DELIVERY OF PREMISES. It is understood and agreed that at the termination of this lease, by normal expiration or otherwise, the lessee shall peaceably and without legal process deliver up the possession of the premises herein described, inclusive of the improvements which are to remain the property of the lessor in good condition usual wear and acts of God excepted.

15. CANCELLATION. During the time the land covered by this lease is under the supervision of the Department of the Interior, it is understood and agreed that if the lessee hereto shall fail to comply with, or shall violate any of the provisions of this contract, the Secretary of the Interior or his authorized representative may declare the lease forfeited after giving notice in accordance with Title 25 Code of Federal Regulations, Part 131 and may thereupon take such action to repossess the premises and such other action as may be necessary to protect the interest of the lessor as provided for by the regulations (25 CFR 131), but such forfeiture shall not release the lessee from paying all rents and other obligations contracted for or from damage for such failure or violation. No assent, express or implied, to any breach of any of the lessee's covenants, shall be deemed to be a waiver of any succeeding breach or any covenants. In the event Federal supervision terminates during the term of this lease, the lessor may exercise all remedies available under the laws of the State in which the land is situated.

16. The lessee further agrees that at the expiration or termination of this lease, he shall remove all buildings and other improvements thereon from the property.

17. It is understood and agreed that any building or other improvement placed on said premises by the lessee shall remain the property of the lessee with the right to remove any and all improvements made by lessee upon termination or expiration of the lease.

18. SURRENDER AND TERMINATION. The lessee may in writing surrender this permit at any time upon the performance of all the lessee's obligations hereunder upon the payment of \$5 and upon showing satisfactory to the Secretary of the Interior or his authorized representative that provision has been made for the conservation and protection of the property. If his permit has been recorded, lessee shall file a recorded release with its application for surrender.

19. The lessee may exercise his option for an additional 25 year lease upon written application to the Northern Cheyenne Tribe and the Superintendent of the Northern Cheyenne Agency.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands  
on this \_\_\_\_\_  
day of \_\_\_\_\_, 19\_\_.

Witnesses (two to each signature):

_____	_____
P.O. _____	_____ //original signed Mark Small Lessee
_____	_____

_____	_____
P.O. _____	_____ Lessee
_____	_____

_____	_____ //original signed Allen Rowland, President Lessor Northern Cheyenne Tribal Council
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_____	_____ //original signed Secretary, Northern Cheyenne Lessor Tribal Council
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_____	_____
P.O. _____	_____ Lessor

_____	_____
P.O. _____	_____ Lessor

_____	_____
P.O. _____	_____ Lessor

_____	_____
P.O. _____	_____ Lessor

_____	_____
P.O. _____	_____ Lessor

_____	_____
P.O. _____	_____ Lessor

Approved SEP 5 1969, 19__	_____ //original signed Approving Official
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